DAMODARAN v. VESUDEVAN

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) & Wan Suleiman F.J.) July 12, 1975]
[Alor Star — Federal Court Civil Appeal No. 68 of 1974]

Practice and Procedure — Lis pendens — Whether order can be made — R.S.C. 1957, O.50 r.1, O.72 r.2 — Courts of Judicature Act, 1964, s. 25(2) and First Schedule, Item 6 — Civil Law Act, 1956, s. 6.

Land Law — Lis pendens relating to land — No provisions for registration — Whether binding on purchaser — National Land Code, s. 340.

In this case there had been a dispute about lands in Kedah and the respondent had filed a caveat against the lands. The appellant successfully applied to have the caveats set aside and eventually obtained an injunction restraining the respondent from again caveating the lands. The respondent subsequently filed a suit against the appellant claiming that he was the owner of a half undivided share in the lands. He then obtained an order that the right in the disputed lands was in question and that that order remain in force as a *lis pendens* for twelve months or until the determination of the suit, whichever was the earlier. (See [1974] 2 M.L.J. 31). The appellant appealed.

Held, dismissing the appeal: under section 25(2) of the Courts of Judicature Act, 1964, the High Court has power to provide for the interim protection of property by the registration of a *lis pendens*.

Cases referred to:-

(1) *Fels* v. *Knowles* (1907) 26 N.Z.L.R. 604, 619-620.
(2) *Waimiha Sawmilling Co. Ltd.* v. *Waione Timber Co.* (1923) 42 N.Z.L.R. 1138, 1156.
(3) *Singapore Pak Hock Pai Athletic Association* v. *Yiu Pek Heng* [1973] 2 M.L.J. 6.
(4) *Sorrell* v. *Carpenter* 2 P. Won. 482.
(5) *Bellamy* v. *Sabine* 1 DeG. & J. 566, 578.

FEDERAL COURT.

Peter Mooney for the appellant.

T. R. Hepworth for the respondent.

Suffian L.P.: There are two separate judgments. First I shall read my own.

This is a dispute about lands in Kedah between the plaintiff and the defendant. The plaintiff caveated the lands. The defendant successfully applied to have the caveats set aside. The plaintiff again caveated the lands. This time the defendant not only successfully applied to have the caveats set aside but also got an injunction restraining the plaintiff from again caveating the lands.

On December 19, 1973, the plaintiff filed a suit against the defendant claiming that the plaintiff was the owner of a half undivided share in the lands.

As he could not caveat the lands, he applied for and won an order that the right in the disputed lands is in question and that that order remain in force as a *lis pendens* for 12 months or until the determination of the suit, whichever is the earlier.

The defendant appeals to us.

The learned judge held that the Land Charges Act 1925 of England (which permits the registration of a *lis pendens*) applies in Kedah.

Before us Mr. Mooney for the defendant argues that that Act provides for the registration of a *lis pendens* only in England and Wales, but the registration there is done not by the courts but by the land authority and that it forms part not of rules of civil procedure but of English land law and that therefore by virtue of section 6 of the Civil Land Act, 1956 (Act 67) it cannot apply here. Mr. Hepworth for the plaintiff says that he did not in the lower court and does not here rely on that Act. With all due respect, I think that the learned judge was in error in relying on that Act for the order that he made.

If at all, that order can be supported only by local law.

As to local law, subsection (2) of section 25 of the Courts of Judicature Act, 1964, provides:

"... every High Court shall have the powers set out in the First Schedule to this Act:
Provided that all such powers shall be exercised in accordance with any written law or Rules of court relating to the same."

Item 6 of the First Schedule reads:

"Power to provide for the interim preservation of property the subject matter of any cause or matter by sale or by injunction or the appointment of a receiver or the registration of a caveat or a *lis pendens* or in any other manner whatsoever."

O.50 r.1 provides:

"1. When by any contract a *prima facie* case of liability is established, and there is alleged as matter of defence a right to be relieved wholly or partially from such liability, the court or a judge may make an order for the preservation or interim custody of the subject matter of the litigation, or may order that the amount in dispute be brought into court or otherwise secured."

O.72 r.2 provides:

"2. Where no other provision is made by any written law or these Rules, the present procedure and practice in England or in Malaya remain in force."

The learned judge held that the English Land Charges Act, 1926, regulated the procedure and practice regarding the registration of a *lis pendens* in England and therefore by virtue of O.72 r.2 it applied in Kedah. As already stated, I respectfully disagree.

It is common ground that in Malaya there is no machinery whereby a *lis pendens* can be registered either under our Rules of the Supreme Court or under the National Land Code. Therefore, Mr. Mooney argues, as there is no "written law or rules of court relating to the same" within the meaning of the proviso to subsection (2) of section 25 of the Courts of Judicature Act, the power "to provide for the interim protection of property the subject of litigation by the registration of a *lis pendens*" which that subsection purports to confer, cannot be exercised by the High Court. It is said that that power may be exercised only if there is written law or rules of court relating to it.

Mr. Mooney argues that the scheme of the National Land Code which governs all dealings with land in Malaya is that an intending purchaser need only consult the register and is bound only by incumbrances that appear on the register and allowing the "registration" of a *lis pendens* which appears on no register at all, is to destroy the cornerstone of the Torrens system. In support he cites several New Zealand judgments, of which it is enough if I reproduce only two: first, this passage from the judgment of Edward J. in the Court of Appeal in *Fels* v. *Knowles*(1):

"In the course of centuries of our English history there had grown up a complicated system of rules regulating dealings with and the transfer of real property. The result was that every dealing necessitated a minute and careful inquiry into the preceding title, attended by great expense, and never result-

ing in absolute certainty of title. More especially the rules affecting the administration of trusts and the fact that notice, direct or constructive, of a breach of trust might result in grevious loss to wholly innocent persons were felt to bear very hardly, without sufficient compensating advantages. Impressed by this view of the matter, it occurred, now many years ago, to an ingenious gentleman in South Australia, Mr. Torrens, that the Merchant Shipping Acts supplied a model from which a scheme of land registration could be devised, by which all trusts should be excluded from the register, and under which a person dealing honestly with the registered proprietor should not be called upon to look further than the register, and should be entirely unaffected by any breach of trust committed by the registered proprietor with whom he dealt. From this genesis sprang the system of land-registration which now prevails in all the Australasian Colonies, and is now represented in this colony by 'The Land Transfer Act, 1885,' and its amendments.

The object of the Act was to contain within its four corners a complete system which could be carried into effect in practice without the intervention of persons skilled in the law.... The cardinal principle of the statute is that the register is everything, and that, except in cases of actual fraud on the part of the person dealing with the registered proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an undefeasible title against all the world. Nothing can be registered the registration of which is not expressly authorised by the statute. Everything which can be registered gives, in the absence of fraud, an indefeasible title to the estate or interest, or in the cases in which registration of a right is authorised, as in the case of easements or incorporeal rights, to the right registered."

This is another passage cited by Mr. Mooney, from the judgment of Hosking J. in the New Zealand Court of Appeal in *Waimiha Sawmilling Co. Ltd.* v. *Waione Timber Co.*[2]:

"In England there is provision for registering a *lis pendens*, and a purchaser *pendente lite* will be bound by the result of any action at law or in equity affecting the property sold which is so registered but he will not be bound thereby unless it is registered or unless he has had express notice of it: *Williams* on Vendors and Purchasers, 2nd edition, 593, 594.... Now we [in New Zealand] have no statutory provision for registration of a *lis pendens* under the Land Transfer Act. The provisions contained in the Code of Civil Procedure with respect to charging-orders have no application to this case. But because of this absence of provision for registration it by no means follows that the ordinary rule applicable to an alienation *pendente lite* is to affect a transferee from a registered proprietor of land to which the *lis* relates. It is, I think, more consonant with the scope and purpose of the Act that a claim the subject of a *lis* should stand on the same footing as other interests which, though recognised, are yet incapable of registration under the Act."

With all due respect, the question for our determination is not what is the position of a purchaser who bought the disputed lands while the *lis pendens* order remained in force, but simply whether or not under the law as it exists today the High Court has power to provide for the interim preservation of property the subject of litigation by the registration of a *lis pendens*. Having given this matter anxious consideration I am of the opinion, following with respect the Singapore Court of Appeal in *Singapore Pak Hock Pai Athletic Association* v. *Yiu Pek Heng*,[3] that our High Court does have that power.

In my judgment, subsection (2) of section 25 of our Courts of Judicature Act is quite clear. It does not say that our High Court may provide for the interim protection of property the subject of litigation by the registration of a *lis pendens*, if and only if written law or rules of court so provide, as is contended by Mr. Mooney. It says quite plainly that the High Court shall have power to provide for the interim protection of such property by the registration of a *lis pendens*. The proviso in my judgment means only this: that if there are written laws or rules of court relating to the same, then this power must be exercised in accordance with them. The proviso does not mean that if there are no written laws or rules of court relating to the same, then the power cannot be exercised at all.

To agree with Mr. Mooney would be to nullify the clear language of subsection (2) of section 25.

From the New Zealand judgments quoted it would appear that there not only is there no provision under the land code for the registration of a *lis pendens* but equally there is no such provision elsewhere. It would appear that that is so because in New Zealand there is nothing corresponding to subsection (2) of section 25 of our Courts of Judicature Act.

Finally I would like to deal with one point mentioned by the learned judge. He appears to think that the provisions in section 340 of the National Land Code relating to indefeasibility of title were inconsistent with O.72 r.2 and therefore by virtue of section 447(1) of the Code which reads:

"(1) Nothing in this Act shall affect the operation of any rules of court; and, if any provision of this Act is inconsistent with any provision of any rules of court, the latter provision shall prevail and the former provision shall, to the extent of the inconsistency, be void."

to the extent of the inconsistency void. With respect I agree with Mr. Mooney that the words "if any provision of this Act" in section 447(1) must be construed to mean "if any provision of this Act *relating to rules of court*", so that only rules of court in the National Land Code, not provisions not relating to rules of court, are void to the extent of the inconsistency if they are inconsistent with rules of court found elsewhere.

In the circumstances, I would uphold the learned judge's judgment albeit for different reasons. I would therefore dismiss this appeal with costs.

Next I shall read the judgment of my brother the Chief Justice of Borneo.

Lee Hun Hoe C.J. (Borneo) (read by **Suffian L.P.**): I have the advantage of reading the judgment of the Honourable the Lord President. I agree that this appeal should be dismissed for the reason that under paragraph 6 of the First Schedule to section 25 of the Courts of Judicature Act, 1925, the High Court has expressly been given power to order the registration of *lis pendens*. I only wish to add a few words of my own to what has already been said because of the importance of the topic and out of respect to both counsel for their interesting and forcible arguments in the matter.

Under the said paragraph 6 one of the additional powers of the High Court relates to the preservation of property and reads as follows: —

"Power to provide for the interim preservation of property the subject-matter of any cause or matter by sale or by injunction or the appointment of a receiver on the registration of a caveat or a *lis pendens* or in any other manner whatsoever."

Section 25(2) of the said Act provides that "every High Court shall have the powers set out in the First

Schedule to the Act; provided that all such powers shall be exercised in *accordance with any written law or rules of court* relating to the same." (The italics are mine).

Like the Lord President, I agree with Mr. Mooney that the learned judge was wrong regarding (1) the application of the English Land Charges Act, and (2) the effect of section 340 of the National Land Code in relation to the rules of court.

Halsbury's Laws of England, 2nd Edition, Volume 20 page 1064 states that the Land Charges Act, 1925 is: —

"An Act to consolidate the enactments relating to the registration of pending actions, amenities, writs, orders, deeds and arrangements and land charges, and to searches."

This Act provides for the registration of a *lis pendens* in England and Wales and does not extend to Scotland and Northern Ireland. In England a register of pending actions is kept by the Chief Land Registrar at His Majesty's Land Registry. The land law in England is quite different from the law in Malaysia which is modelled on the Torrens system of Australia.

A passage taken from a joint judgment of the Court of Appeal delivered by Edwards J. in *Fels* v. *Knowles*[1] describing English land law and the eventual devising of the Torrens System reads: —

"In the course of centuries of our English history there had grown up a complicated system of rules regulating dealings with and the transfer of real property. The result was that every dealing necessitated a minute and careful inquiry into the preceding title, attended by great expense, and never resulting in absolute certainty of title. More especially the rules affecting the administration of trusts and the fact that notice, direct or constructive, of a breach of trust might result in grievous loss to wholly innocent persons were felt to bear very hardly, without sufficient compensating advantages. Impressed by this view of the matter, it occurred, now many years ago, to an ingenious gentleman in South Australia, Mr. Torrens, that the Merchant Shipping Acts supplied a model from which a scheme of land registration could be devised by which all trusts should be excluded from the register, and under which a person dealing honestly with the registered proprietor should not be called upon to look further than the register, and should be entirely unaffected by any breach of trust committed by the registered proprietor with whom he dealt. From this genesis sprang the system of land-registration which now prevails in all the Australasian Colonies, and is now represented in this colony by 'The Land Transfer Act, 1885,' and its amendments.

The object of the Act was to contain within its four corners a complete system which any intelligent man could understand, and which could be carried into effect in practice without the intervention of persons skilled in the law. In this respect the Act goes so far as to make provision for the licensing of unskilled persons, called landbrokers, to act for reward in the preparation of the instruments necessary to carry its provisions into effect. The cardinal principle of the statute is that the register is everything, and that, except in cases of actual fraud on the part of the person dealing with the registered proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against all the world. Nothing can be registered the registration of which is not expressly authorised by the statute. Everything which can be registered gives, in the absence of fraud, an indefeasible title to the estate or interest, or in the cases in which registration of a right is authorised, as in the case of easements or incorporeal rights, to the right registered."

This does not assist us in the present case. We know from *Williams on Vendors and Purchasers*, 2nd Edition, pages 593 & 594 that in England there is provision for registering a *lis pendens*, and a purchaser *pendente lite* will be bound by the result of any action at law or in equity affecting the property sold which is so registered, but he will not be bound thereby unless it is registered or unless he had express notice of it. Legislation pertaining to registration of *lites pendentes* was introduced to neutralise the rigor of the doctrine of *lis pendens* affecting a purchaser. Thus, Salmond J. said in *Waimiha Sawmilling Co. Ltd. (In Liquidation)* v. *Waione Timber Co. Ltd.*[2] that: —

"The rule of common law and equity was that a party to litigation relative to real estate could not destroy or affect the rights of the other party by alienating or otherwise dealing with the estate *pendente lite*, and that a purchaser of the estate, even though he had no notice of the existence of the action or suit was bound by the judgment or decree, and took title subject thereto. In *Sorrell* v. *Carpenter*[3] it is said: 'Where there is a conveyance made *pendente lite* ... even though the alienation be for ever so good a consideration, yet is made *pendente lite*, the purchase is to be set aside; and this in imitation of the proceedings of a real action at common law, where, if the defendant aliens after the pendency of the writ, the judgment in the real action will overreach such alienation.' So in *Bellamy* v. *Sabine*[4] it is said: 'It is scarcely correct to speak of *lis pendens* as affecting a purchaser through the doctrine of notice, though undoubtedly the language of the courts often so describes its operation. It affects him not because it amounts to notice, but because the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute so as to prejudice the opposite party. Where a litigation is pending between a plaintiff and defendant as to the right to a particular estate, the necessities of mankind require that the decision of the court in the suit shall be binding not only on the litigant parties, but also on those who derive title under them by alienations made pending the suit, whether such alienees had or had not notice of the pending proceedings'."

There is nothing to indicate the existence of similar provisions as paragraph 6 of the First Schedule to section 25 of the Courts of Judicature Act, 1964 in New Zealand. Why cannot we follow what was adopted in England regarding the doctrine of *lis pendens* before the introduction of modern legislation or registration? Is it because the Torrens System which we adopt is different from English land law? Assuming that *lis pendens* cannot be registered under the National Land Code or elsewhere then the effect is that a purchaser cannot be bound by an interest which is not registered.

In England there is no question of caveat as registration of *lis pendens* fulfils the need. Registration of an instrument or matter that is required or authorised to be registered under the Land Charges Act, 1925 operates as actual notice thereof and of the fact of registration to all persons and for all purposes connected with the land affected (see section 198 of the Laws of Property Act, 1925). However, this is without prejudice to the effect of section 94 of the Laws of Property Act, 1925 in relation to the making of further advances by a mortgagee.

In fact, Mr. Hepworth made it quite clear in his submissions that it was not part of his case that the Land Charges Act, 1925 was part of the law of Malaysia. We are concerned with the law as it is and not as it ought to be. The said Act forms part of the land law of England but not part of the rules of practice and procedure of the courts. The said Act has no application to Malaysia by virtue of section 6 of the Civil Law Act, 1956 (Act 67) which reads: —

"6. Nothing in this Part shall be taken to introduce into Malaysia or any of the States comprised therein any part of

the law of England relating to the tenure or conveyance or assurance of or succession to any immovable property or any estate, right or interest therein."

There is, therefore, nothing to indicate that the said Act has been extended to Malaysia or made part of the law of Malaysia. *A fortiori* the English Land Charges Act, 1925 has no application to the State of Kedah.

Section 340 of the National Land Code is concerned with the indefeasibility of title. Order 72 rule 2 provides that: —

"Where no other provision is made by any written law or these Rules, the present procedure and practice in England or in Malaya remain in force."

The learned judge considered that section 340 contravened Order 72 rule 2 and by virtue of section 447 of the Code section 340 was rendered void to the extent of the inconsistencies and the rule prevailed. Suffice for me to say I agree with the interpretation given by the Lord President. Perhaps, I need only add that if the learned judge was right the startling result would be that a subsidiary legislation could override an Act of Parliament. However, I think the learned judge was right when he said that by section 4 of the Courts of Judicature Act, 1964 in the event of inconsistency or conflict between the Act and any other written law (*e.g.* the National Land Code) other than the Constitution the provisions of the Act shall prevail.

Mr. Mooney submitted that although the Courts of Judicature Act, 1964 gives the High Court very wide general powers the High Court ought not to make a *lis pendens* order unless there is "any written law or rule of court" relating to the registration of *lis pendens*. Admittedly, there is no machinery for registering of a *lis pendens* either under the Rules of the Supreme Court or the National Land Code which merely provides for registration of caveats, and prohibitory orders. Other matters capable of registration under the Code are transfers, leases and tenancies, charges and liens and easements. It was argued that all that a purchaser need to know before buying land is to search the register. If a *lis pendens* order could be made then a purchaser could not rely on the register with certainty. This would destroy the very basis or cornerstone of the National Land Code. As the Lord President has rightly pointed out we are not concerned with the position of the purchaser during the pendency of a *lis pendens* but with the question whether the High Court has the power to make an order for the preservation of property which is the subject of litigation by a *lis pendens* order.

It was pointed out that except for Penang and Singapore it was the first time such an order had been made by the High Court. In Singapore in *Pak Hock Pai Athletic Association* v. *Yiu Pek Heng*,[5] the appellants applied *ex parte* for a *lis pendens* order against certain property which they claimed was bought partly out of funds belonging to them and the order was made. On the application of the respondent, the learned Chief Justice (Singapore) set aside the order on the ground that the 1970 Rules of the Supreme Court did not provide for making such an order. In allowing the appeal the Court of Appeal held that there was express enactment giving the High Court power to make a *lis pendens* order. It is true in the Singapore case reference was made to Order 47 rules 21 and 22 of the Rules of the Supreme Court, 1934. Mr. Hepworth said that similar rules operated in Penang and Malacca until 1957. He referred to sections 3 and 12 of the Courts Ordinance, 1946 and contended that these provisions in effect gave to the High Court in Malaysia the power formerly exercised by the High Court in the Straits Settlements. He also referred to section 47 of the Courts Ordinance, 1948, in particular item 10 of the 2nd Schedule relating to preservation of property, *lis pendens* and so forth, section 110 and to the Schedule which included the Courts Ordinance, 1946. It was his contention that the Rules of the Supreme Court as applicable to the Straits Settlements were thus saved. I should point out that section 47 has since ben repealed so also the Courts Ordinance, 1946 by the Subordinate Courts Act, 1948 (previously the Courts Ordinance, 1948) which was revised and came into force on November 1, 1972.

The absence of provision for registration does not mean that the parties are not bound by the *lis* affecting the land in dispute. It is more consonant with the scope and purpose of our National Land Code that a claim which is the subject of a *lis* should be recognised and accepted in the same way as we recognise and accept other interests which are incapable of registration. One of such interests is an unregistered lease. The parties to such a lease will be bound even if it is not registered. We are not concerned with a purchaser but the parties to the suit. If the High Court has the power to make a *lis pendens* order binding on the parties then the appeal must fail.

The absence of provisions for registration is immaterial as between the parties to the dispute in respect of the land. The *lis pendens* order remains valid in every respect except perhaps against a purchaser. It is a matter for the legislature to decide whether there should be legislation for registration of a *lis pendens* or other instruments. The Attestation of Registrable Instruments Act, 1960 (No. 1 of 1960) is an Act to repeal and re-enact with amendment the law relating to the attestation of instruments required to be registered under any written law relating to land, mining or the registration of deeds. Under the Second Schedule, Part II the Registration of Deeds Ordinance S.S. Cap. 121 applies to Malacca and Penang. Until there is such legislation perhaps a purchaser who has no express notice would not be bound by a *lis pendens*. All I would say, as was said by the Singapore Court of Appeal, is that there is also clear legislative provision empowering the High Court in Malaysia to grant an application for a *lis pendens*. I would also uphold the decision of the learned judge and dismiss the appeal with costs.

Suffian L.P.: Finally I am authorised by my brother Wan Suleiman F.J. to say that he agrees that this appeal be dismissed with costs.

The order of this court is therefore that this appeal be dismissed with costs, and that the appellant's deposit be paid to the respondent against his taxed costs.

Appeal dismissed.

Solicitors: *Skrine & Co.; Allen & Gledhill.*